



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-179684

10-278
December 26, 1973

Roofers, Incorporated
325 West 23rd Street
Baltimore, Maryland 21211

Attention: Mr. F. Robert Ulrich
General Manager

Gentlemen:

Reference is made to your letter of September 7, 1973, protesting the proposed award of a contract to Dee Cee Roofing Company, Incorporated (Dee Cee), under invitation for bids No. C-72178/BFI-2, issued on July 18, 1973, by the Government of the District of Columbia (D.C. Government), for roof rehabilitation at the Spring Road Clinic. For the reasons stated below, your protest is denied.

Bids were opened on August 1, 1973, and four bids were received. The bid from Dee Cee Roofing Company, Incorporated, at \$52,200 was the low bid and your bid at \$59,890 was second low. Upon examination of the bids it was found that the bid from Dee Cee did not comply with the requirements of the invitation in two respects. Dee Cee submitted a 20 percent bid bond rather than the 5 percent bid bond required. In addition, Dee Cee failed to include an executed certificate of compliance with the equal opportunity obligations provision included in the solicitation.

The contracting officer concluded that furnishing a bid bond in excess of the amount required did not render the bid nonresponsive. The question of whether Dee Cee's bid was nonresponsive for failing to include the certificate of compliance with the equal opportunity obligations was forwarded to the D.C. Contract Review Committee, which concluded that Dee Cee's bid was responsive based on the fact that the Commissioner's Order and Administrative Instructions were a part of the specifications on which the bidder submitted his bid. On August 31, 1973, Dee Cee furnished an executed certificate of compliance with the equal opportunity obligations. Award is being withheld pending our decision on the protest.

The primary basis of the protest concerns the legal effect of Dee Cee's failure to certify as provided in the solicitation

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that it was fully aware of the content of and agreed to comply with the Commissioner's Order and the Commissioner's Administrative Instruction referred to on the page included with the solicitation entitled "Compliance With Equal Opportunity Obligations," which stated as follows:

"COMMISSIONER'S ORDER 73-51 DATED FEBRUARY 28, 1973
'COMPLIANCE WITH EQUAL OPPORTUNITY OBLIGATIONS IN
CONTRACTS' AND THE 'COMMISSIONER'S ADMINISTRATIVE
INSTRUCTION DATED FEBRUARY 28, 1973, CHAPTER 2621,'
ARE INCLUDED AS A PART OF THIS INVITATION TO BID
AND EACH BIDDER SHALL INDICATE IN HIS BID DOCUMENT
HIS COMMITMENT, IN WRITING, TO COMPLY WITH THE
COMMISSIONER'S ORDER AND ADMINISTRATIVE INSTRUCTION.
FAILURE TO COMPLY WITH THE AFOREMENTIONED MAY RESULT
IN REJECTION OF HIS BID."

The Commissioner's Order and the Administrative Instruction referred to in the above statement were included with the bid documents.

In general, the Commissioner's Order sets forth the policy of the D.C. Government to provide equal opportunity in employment, as well as provisions to be included in contracts, duties of the contracting agencies, and requirements for contractors. It also provides that the procedures to be followed in implementing the Order shall be those set forth in the Commissioner's Administrative Instruction.

The Commissioner's Administrative Instruction sets forth employment ranges constituting acceptable minimums upon which a prospective contractor must establish its commitment to meet affirmative action obligations for utilization of minorities for designated trades for construction contracts in excess of \$100,000, and requires the submission of an affirmative action plan. For contracts under \$100,000, the Instruction provides that the contractor shall submit a personnel utilization schedule; however, there is no statement as to what standards constitute acceptable minimums and no requirement for submission of an affirmative action plan based upon such minimums. The D.C. Government has advised that criteria for acceptable minimums for contracts under \$100,000 had not been developed as of the time of the issuance of this solicitation. We have been further advised that the D.C. Government is presently working on establishing minimum acceptable standards for construction contracts under \$100,000.

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Although a commitment to minimum manpower utilization goals was not required by this solicitation, the Administrative Instruction did impose certain other affirmative action requirements, such as utilization of minority owned subcontractors and maintenance of a training program. However, we do not believe that completion of the certification was necessary to establish a bidder's obligation to comply with those requirements upon acceptance of its bid. It is well established that a bidder can commit itself to a solicitation's affirmative action requirements in a manner other than that specified by the solicitation. 51 Comp. Gen. 329 (1971); B-176328, November 8, 1972; B-177846, March 27, 1973. Here, the "Compliance With Equal Opportunity Obligations" clause stated that the Commissioner's Order and Administrative Instruction were "included as a part of this invitation to bid." The bid form signed by the bidder stated:

"The undersigned agrees * * * to * * * perform all work specified in accordance with all terms and conditions of this Invitation and the General Provisions Booklet, * * * specifications, addenda, schedules, plans and conditions (incorporated herein by reference and made a part hereof,) * * *."

As indicated above, the Order and Administrative Instruction did not require the submission or adoption of minority manpower utilization goals, but did require the contractor to take certain other affirmative action steps. We think that by signing the bid form Dee Cee obligated itself to meet these requirements, and that therefore its failure to sign the certification did not render its bid nonresponsive. See B-174216, December 27, 1971. In this connection, we note that even though the IFB contained a certification statement that could be completed by a bidder, there was no explicit IFB requirement for execution of that or any other certificat

In view of the foregoing, we agree with the D.C. Government that the failure to furnish the prebid certificate regarding compliance with equal opportunity obligations was a matter of form rather than substance and does not constitute a basis for rejecting Dee Cee's bid.

The final point concerns the effect of furnishing a bid bond in excess of the amount required. Since this is not the type of deviation that would give Dee Cee an advantage over your concern, it may be waived as a minor informality. See 38 Comp. Gen. 830 (1959).

Sincerely yours,

R. F. Kellar

Deputy
Comptroller General
of the United States

Enclosure